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Supreme Court of the United States

October Term, 1943

No. 567

THE WHOLESALE DRY GOODS INSTITUTE, INC., ET AL.,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matters Involved

Respondent, Federal Trade Commission, issued an order on November 24, 1941, directing the Wholesale Dry Goods Institute, Inc., its officers, directors and members, the Petitioners herein, to cease and desist from certain alleged violations of Section 5 of the Federal Trade Commission Act.

The order of the Commission declared (fols. 982 *et seq.*):

> (1) The Institute, its officers, directors and members were guilty of unfair methods of competition within the meaning of the Federal Trade Commission Act.

(2) The complaint was dismissed as to seven of the original respondent concerns.

(3) The motion of the present petitioners to have certain evidence received and considered was denied.

The Institute is a membership corporation organized under the laws of New York in November, 1928. The program of the Institute was as follows:

(1) The gathering and dissemination among the Institute's members of a list of manufacturers classified according to which of several mill selling policies they followed (C. Ex. 53); and,

(2) The dissemination among members and classified manufacturers of a list of "wholesalers" in the dry goods business, according to the Institute's definition of that term (C. Ex. 16).

The information service as to mill selling policies was begun by the Institute in 1930. It grew out of a report of a "Differential Committee" (R. Ex. 122), and is explained in the "Confidential Report on Mill Selling Policies" (C. Ex. 53). Mills which discriminated against wholesalers and retailers generally by giving to certain retailers the price accorded to wholesalers received a classification different from that accorded to manufacturers who confined such price level to its true economic wholesale function.

The Institute adopted a definition of a "wholesaler" of dry goods which was included in the Report on Mill Selling Policies, and which corresponded to the accepted meaning of the term; and in 1935 the information service as to wholesalers was begun by the preparation and dissemination of a list of firms conforming to that definition. This list became known as the Directory (C. Ex. 16). The Directory included any wholesaler of dry goods whether or not they were members of the Institute. In 1935 the list numbered 1400 of which 213 were members of the

Institute (C. Ex. 16). In 1939 the list numbered 1147 wholesalers of which 126 were members of the Institute (C. Ex. 17).

The Institute offered to prove that sales by its members amounted to not more than 8.05% of the total volume of sales to retailers of drygoods and kindred lines throughout the industry; but this offer was rejected as irrelevant, —erroneously, we claim (fols. 5325-31).

The Federal Trade Commission made findings that these information services were sufficient to infer the existence of an agreement among wholesalers to refrain from buying from manufacturers of low classification and to restrain manufacturers from selling to firms not listed as "wholesalers" in the Institute's Directory (fols. 841 *et seq.*).

Action of the Circuit Court of Appeals

The Circuit Court of Appeals affirmed, with an Opinion *per curiam*, printed in the Appendix hereto.

That Opinion predicates itself on the Court's interpretation of *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, in relation to the subsequent decisions in

Maple Flooring Association v. *United States*, 268 U. S. 563;

Cement Manufacturers Protective Association v. *United States*, 268 U. S. 588;

Appalachian Coals, Inc. v. *United States*, 288 U. S. 344.

The Court's conclusion as to the basic law of the instant case was that these later decisions in no way affected the *Eastern States* decision, and that

> "Nothing which has followed has qualified that ruling; it remains true, now as it was then, that such a combination is unlawful no matter how pressing may be the evils which it is designed to correct, and which indeed it may in fact correct; as in the case of the combination to fix prices, nothing will justify it. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150."

Evidence of the purpose, background and operation of the services described above and of the evils, illegalities and discriminations against which they were directed, was refused by the Commission as irrelevant to the issues involved (fols. 5185-94, 5497-5507). This refusal was assigned as error to the Circuit Court of Appeals, but that Court failed to consider the assignment of error in its opinion.

Evidence as to the character and background of the hybrid concerns masquerading as wholesalers was also refused by the Commission as irrelevant (fols. 4393-6, 4423-33, 790-1, 4758-9, 793-5, 4983-5, 584-615). This refusal was assigned as error to the Circuit Court of Appeals, but again that Court failed to consider the assignment of error in its opinion.

Jurisdiction of this Court

The decree of the Circuit Court of Appeals was entered on December 2, 1943 (R. p. ~~1317~~ 1891).

The jurisdiction of this Court rests upon Sec. 5 of the Federal Trade Commission Act (15 U. S. C., Sec. 45) and Sec. 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

Statute Involved

The primary statute involved is the Act of September 26, 1914, c. 311, 38 Stat. 717 (15 U. S. C., Secs. 41, *et seq.*), known as the Federal Trade Commission Act. The pertinent provisions of this Act at the time the Commission issued this order are:

> Sec. 5 (a)—"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Petitioners' Contentions

It was and is the contention of the Institute and its members that the dissemination of the information as to mill selling policies and as to being actual wholesalers was not illegal or unfair, but was itself a legitimate defensive measure against practices which were themselves unfair and illegal; and that the petitioners should have been given full opportunity to prove that the program of the Institute was an information service issued for defensive purposes and was not a concerted combination to boycott or blacklist any one.

The petitioners contend that such few instances as the record contains of failure by manufacturers to sell in certain individual cases after receipt of information that a specific customer was not in fact a wholesaler, represented merely a voluntary choice and decision, and constituted no evidence of any agreement to restrain or coerce any one. Of course competition based on enlightenment will manifest some choices of customers which would not have been made in competition based on ignorance.

Questions Presented

We respectfully claim that:

(1) The Commission and the Court below have implicitly adopted the erroneous but far-reaching theory of law that it is an unfair trade practice and an illegal restraint for wholesalers as a measure of self-defense against fraudulent, unethical, illegal or discriminatory practice to gather and disseminate to manufacturers information as to whether a given buyer is masquerading as a wholesaler to gain an unfair commercial advantage for himself.

(2) The Commission and the Court below have also implicitly adopted the erroneous but far-reaching theory of law that it is an unfair trade practice and an illegal restraint for wholesalers to gather and disseminate information as to selling policies of manufacturers, since such information may lead some wholesalers to decide not to buy from manufacturers who were covertly discriminating against wholesalers and subsidizing certain retailers as competitors of wholesalers by according them the wholesalers' differential.

(3) The Commission and the Court below have also implicitly adopted the erroneous but far-reaching theory of law that the basic finding of a combination "not to buy of manufacturers who dealt with retailers on the same terms on which they dealt with wholesalers", can be sustained by inference from generalities without any evidence of a single instance of loss of member business by any manufacturer.

(4) As a result of these erroneous theories of law, the Commission made at the trial basic and highly prejudicial errors which deprived the defendants of a fair trial by refusing them the right to prove facts

relevant to their case and to present all available defenses.

(5) As a result of the same erroneous theories of law, the Commission failed and refused to make findings of fact as to the actuality of the trade frauds and duplicities against which the program of the Institute was directed.

Reasons Relied Upon for the Allowance of the Writ

This case presents matters of great public importance relating to permissible boundaries of action by trade associations in measures of self-defense against fraudulent, unethical or illegal practices.

It is serious indeed if it be the law, as announced by the Circuit Court of Appeals, that a combination to gather and disseminate to its members information relative to practices which are fraudulent, immoral, unethical, discriminatory or illegal is unfair or illegal "no matter how pressing may be the evils which it is designed to correct, and which indeed it may correct."

It is even more serious if it be the law, as announced by the Circuit Court of Appeals, that such a combination is analogous to "the case of the combination to fix prices, nothing will justify it."

The ruling made by the Circuit Court of Appeals that the *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, compels such theories of law and condemns all that was done here, is an extreme and unwarranted interpretation and application, and is, we submit, in conflict with applicable decisions of this Court discussed hereafter.

The ruling made by the Circuit Court of Appeals that these subsequent decisions of this Court, upholding the right of an industry or trade group to self-enlightenment as to fraudulent, immoral, unethical or illegal practices, are not qualifications of the principles which the Court of

Appeals says it finds in the *Eastern States* case, cannot be sustained.

The consequences of the decisions below are that an industry or trade group can look only to the government for protection from fraudulent, immoral, unethical or illegal practices, and can obtain only from the government or by the individual effort of individual members, information as to facts pertinent to the preservation of honest and enlightened competition.

If it is unfair or illegal to warn of pretense lest the pretenders lose business, then free enterprise becomes enslaved to ignorance, and competition becomes mere strife in the dark.

WHEREFORE, the petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the said order of the Federal Trade Commission be reversed by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, December 29, 1943.

THE WHOLESALE DRYGOODS INSTITUTE, INC., *et al.*,
Petitioners.

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BRIEF IN SUPPORT OF PETITION

POINT I

The defendants, we respectfully submit, were not accorded a fair trial.

They were prevented from showing that their acts had neither the intent, nor the effect, nor the power, to constitute the unfair methods of competition charged.

Moreover, they were concluded by the erroneous theory of law that because information as to fraudulent, immoral, illegal or discriminatory practices might influence someone's decision as to a person with whom not to trade, a combination to gather and disseminate such information among its members was unfair competition and an illegal restraint of trade.

(1) This proceeding involved the limited statutory issue (Sec. 5a Federal Trade Commission Act) of whether the foregoing measures adopted by the defendants constituted "unfair methods of competition in commerce" within the meaning of that Section. The case entails no element of price fixing.

To meet this narrow statutory issue so tendered, these defendants sought to show by their Offers of Proof and by their Motion before the Commission to reverse the Trial Examiner's rulings on the evidence that those methods were in fact fair because they constituted purely defensive measures adopted by them for their protection against devious methods for wrongful gain.

Self-protection against fraud and chicanery is not unfair competition or an unlawful restraint of trade.

Defendants offered to prove that these aggressors threatened to destroy defendants by action amounting (a) to common law frauds and cheats; (b) to "unfair or de-

ceptive acts or practices in commerce", declared unlawful by express amendment to the Federal Trade Commission Act adopted in 1938; and (c) to violations in certain instances of the Robinson-Patman Act (Sec. 13, Title 15, U. S. C. A.) (fols. 5185-94, 5497-5507, 4393-6, 4423-33, 790-1, 4758-9, 793-5, 4983-5, 584-615).

The defendants sought to show that it had become the habitual and widespread practice of many retailers to defraud manufacturers and injure manufacturers and other retailers by falsely masquerading as bona fide wholesalers in order to obtain from manufacturers, without their knowledge, the benefit of the differentials accorded to the economic function performed by bona fide wholesalers (fols., *supra*).

(2) Having thus sought to prove that these methods were neither intended nor calculated to effect a conspir cy in restraint of trade and that they were in themselves fair in view of the necessities which they were designed to meet, defendants next sought, by their unsuccessful Offers of Proof and by their unsuccessful Motion before the Commission to reverse the Trial Examiner's Rulings on the evidence (fols. 249-253, 490-2), to show a total absence of power upon their part to effect any violation of the Sherman Act.

The Commission also rejected their offer to show that sales by members of the Institute amounted to not more than 8.05 per cent of the total volume of sales to retailers of dry goods and kindred lines throughout the industry (fols. 5325-31).

(3) In seeking to clarify the status of wholesalers, the defendants not only served the socially useful function of protecting both wholesalers and manufacturers against the perpetration of these dishonest, illegal and discriminatory trade practices,—they likewise performed the valuable service of protecting the bona fide retailer against the usurpation of a false status by his fellow retailer.

The Report of the Differential Committee (R. Ex. 122) emphasized this very purpose through its announcement that "* * * the Institute is empowered to collect and disseminate information for the guidance of the action of the individual members in protecting themselves against fraud." Defendants' action was taken in a reasonable reliance upon the holdings of this Court in *Swift & Co.* v. *U. S.*, 196 U. S. 375, approving the adoption of rules which "in good faith are calculated solely to protect the defendants against dishonest and irresponsible dealers", and in *Cement Manufacturers Ass'n.* v. *U. S.*, 268 U. S. 588, that it "cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts * * * as an unlawful restraint of trade * * *" (p. 604).

(4) As to the matter of mill selling policies, the Commission's own proof (C. Ex. 53) established that, notwithstanding the socially and economically useful function which wholesalers performed, many manufacturers indulged in the practice of selling to some retailers at the same price as they sold to the wholesale trade.

The effect of this practice was to subsidize unfairly the favored retailer through an unearned and unjustified discrimination as a competitor of the actual wholesalers; and this practice also inevitably created an unfair discrimination as between groups of retailers and in the ultimate outcome as against the consuming public.

Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, reads, in part, as follows (15 U. S. C. A., sec. 13):

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * and where the effect of such discrimination may be substantially to lessen competition or

> tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

A practice by a manufacturer of selling at the same price level to wholesalers and to such retailers as were accorded the privilege or had the opportunity of buying from him, would create a treble discrimination, both unfair according to any proper standard of competition and unfair as an act or practice under Section 5a of the Federal Trade Commission Act, as well as being illegal under the Robinson-Patman Act just quoted.

In the first place, it would work a discrimination against the actual wholesalers because they had to carry the burdens of discharging the wholesaler's economic functions of distribution, whereas the retailer, who bought at the same price from the manufacturer, was freed for purposes of competition from all these burdens. In the second place, other retailers who were not accorded the privilege or did not have the opportunity of purchasing from a manufacturer who had such a mill selling policy, would be obliged to purchase from a wholesaler and thus pay a higher price than the aforesaid more fortunate retailer. In the third place, there would also result a discrimination as against the consumers because the consumers would not receive the economic equivalent of the unearned advantages derived through such a mill selling policy by the favored retailers.

(5) Notwithstanding the notorious commission of these unfair and illegal acts, established by the Federal Trade Commission's own proof in this case, the Commission did not suppress them. Instead, in 1939 it instituted this proceeding which has had the effect of nullifying the efforts of the industry to protect itself against them.

In an effort to show the dire plight to which wholesalers had been reduced by force of this illegal competition and of the failure of the Commission in its suppression, defendants, by their various Offers of Proof and Motion before the Commission to reverse the Trial Examiner's rulings on evidence, sought to show the conditions leading up to and necessitating the inauguration by the Institute of its defensive program. Their offers were designed to demonstrate both the conditions and abuses prevailing in the industry and the economic background and context in the light of which they had been forced by aggressive tactics within the industry to unite for protective—not retaliative—purposes (fols. 5185-94, 5497-5507, 4393-6, 4423-33, 790-1, 4758-9, 793-5, 4983-5, 584-615, *supra*).

In *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231 (repeated in the *Appalachian* and numerous other cases), this Court said that with respect to the legality of a restraint of trade:

> "To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts" (p. 238).

So far as concerned the defendants' endeavor to disprove the charge that their methods of competition were unfair, defendants came within the familiar rule, many times declared, that in a statutory proceeding of this character "Whether the means used are fair or not depends upon the necessities of each case." *Butterick Publishing Co.* v. *F. T. C.*, 85 F. (2d) 522, page 526.

Defendants were in fact but erroneously charged with what, on this one-sided record, was represented to be an unlawful boycott. Even at that, however, both this and other courts have said:

> "So long as the particular agreement is not intended to and does not have the necessary effect of eliminating beneficial competition, a boycott designed to prevent the commission of an illegal act may be unobjectionable. *United States* v. *American Livestock Comm.*, 279 U. S. 435; *Swift & Co.* v. *United States*, 196 U. S. 375; *Butterick Publishing Co.* v. *Federal Trade Commission, supra; United States* v. *Sugar Institute*, 15 F. Supp. 817, 899, modified and affirmed 297 U. S. 553."
>
> *Millinery Creators' Guild* v. *Federal Trade Commission*, 109 F. (2d) 175, aff'd 312 U. S. 469 (p. 176).

(6) In the present case, having erroneously conceived defendants' case as one of unlawful boycott, instead of allowing them latitude to meet the burden of proof and contradiction thus mistakenly thrust upon them (*United States* v. *American Livestock Commission*, 279 U. S. 435), the Commission and the court below effectively curtailed, if not denied, the right of refutation.

The Commission's basicly erroneous conception of the law of the case (as we submit) even resulted in exclusion of proof that certain pretended wholesalers were in fact retailers (fols. 584-615).

The theory of the Commission and of the court below seems to have been that to warn of the pretense was to blacklist the pretenders and hence to be unfair to competition by pretense.

Under that mistaken theory proof of the pretense and of its falsity was, of course, irrelevant.

That theory we respectfully challenge as basicly erroneous.

(7) The alleged inability of certain buyers in certain instances to buy goods at the manufacturer's price to wholesalers, relates to less than a dozen buyers.

Vital evidence of the petitioners on the issue of whether or not these buyers were dishonestly masquerading as wholesalers and on the issue of whether or not their type of competition was dishonest, was excluded (fols. 584-615).

No case has held that it is legal for buyers to misrepresent that they are wholesalers in order to deceive manufacturers into selling them at the wholesale price.

The act of a concern in representing itself to be a wholesaler when it is not such in fact, has been held unlawful. (*L. & C. Mayers Co., Inc.* v. *Federal Trade Commission*, 97 Fed. (2d) 365, 366 (C. C. C. 2nd).)

(8) Furthermore, information activities, such as petitioners', may properly bring to light trade information and trade evils, entirely apart from any question of whether the information or trade evils disclosed involve any violation of positive law. For example, in *Cement Manufacturers Protective Association* v. *U. S.*, 268 U. S. 588, the Court sustained the right of the Association to furnish credit information about customers of manufacturers. As stated in the information program case of *Sugar Institute* v. *U. S.*, 297 U. S. 553, 598 (1936):

> "And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law."

(9) In determining whether the Commission committed reversible error in excluding evidence, the true test is not whether the admission of the evidence would necessarily lead to a different result, but whether its admission might induce the Commission to reach different results. *Fresh Grown Preserve Corp.* v. *F. T. C.*, 125 F. 2nd 917 (C. C. A. 2nd, 1942); *N. L. R. B.* v. *Indiana & Michigan Electric Company*, 318 U. S. 9 (1943).

POINT II

The Circuit Court misinterpreted and misapplied *Eastern States Lumber Ass'n* v. *U. S.*, 234 U. S. 600, the authority upon which it purported to act in sustaining the Federal Trade Commission's order.

(1) We respectfully submit that the extreme interpretation of that decision by the Circuit Court of Appeals overlooks:

(a) That case was decided before the enactment of *either* the Federal Trade Commission Act *or* the Clayton Act—and, of course, before the Wheeler-Lea and Robinson-Patman Act amendments—all of which Acts and amendments declared a legislative policy rendering illegal the unfair competition and discrimination against which the defensive measures were adopted here.

(b) That case necessarily did not involve the specific statutory issue presented here baldly for the first time, *i. e.*, Is it, of itself alone, an "unfair method of competition" for members of an industry to resist, by a united front, the efforts of their lawbreaking competitors whose effect was to injure them by unlawful discrimination and illegal competition?

(c) That case must be read with many subsequent decisions by this Supreme Court upholding programs by an industrial group for enlightenment as to fraudulent, immoral and unethical practices.

(2) The *Eastern States* case, unlike the present case, did not present an instance of defensive measures against those who sought to secure, deceptively and even illegally, commercial advantages by pretending to be what they were not.

In the *Eastern States* case the program was, through listing the wholesalers who dealt directly with the consumer, to exclude such wholesalers from the patronage of the combining retailers. There, unlike the present instance, the action condemned was not aimed at fraudulent or illegal competition as in the case at bar. It was not undertaken in self-defense against immoral or unethical action. On the contrary, it was directed against legitimate and open dealing on the part of other members of the industry. There was no subsidizing by a manufacturer of a retailer by giving him the wholesale differential for a function which he did not perform.

Furthermore, in that case all retailers who were members of the Association were (as this Court later pointed out in the *Maple Flooring* case, 268 U. S. 563, 579) by their agreement with the Association expressly "*required* to report to the Association" all instances where any wholesaler sold direct to consumers in their locality; and thereupon such wholesalers so reported were placed on a circularized list. There was no such requirement in the instant case.

This Court quoted as cogent to the result reached the concession made by the Association's counsel that the purpose and effect of its program was (p. 609):

> "* * * to cause retailers receiving these reports to withhold patronage from listed concerns. That was of course the very object of the defendants in circulating them."

The following also was part of the plan, as described by the Association's own counsel (p. 608):

> "Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers."

Moreover, in the *Eastern States* case the Court said (p. 612):

> "This record abounds in instances where the offending dealer was thus reported, the hoped for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired."

On the strength of this proof and of these concessions as to plan, intent and effect by counsel for the Association itself, the Supreme Court found that there was a wrongful boycott, and said (p. 611):

> "Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him but with all others of the class who may be informed of his delinquency."

(3) Equally inapposite is *Fashion Originators Guild* v. *Trade Commission*, 312 U. S. 457, pressed by the Commission on the court below. There (to quote the opinion, p. 461) manufacturers of women's garments admitted "that to destroy such competition they have in combination purposely boycotted" all parties who bought copied dress designs, irrespective of whether they had done so innocently or not.

That case, like its companion case, *Millinery Creators Guild* v. *Trade Commission*, 109 F. (2d) 175, affirmed 312 U. S. 469, involved (see 109 F. (2d) p. 177) "concerted action aimed at abolishing socially useful types of competition."

In the case at bar the types of competition involved were illegal, fraudulent, unethical or discriminatory competition,—not "socially useful types".

(4) Defendants respectfully assert that it is no answer to their contentions—at least not under our present form of social order—to say, as the Commission has elsewhere intimated (see its brief on application to this Court for Writ of Certiorari in *Millinery Creators Guild, Inc.* v. *F. T. C.*), that these defendants have only *two* "choices"—

(a) Either they must sit supinely by awaiting their deliverance through the paternalistic intervention of whatever benevolent governmental agency may in due time be moved to help them, or else

(b) They must resort to the alternative, both inadequate and futile, of attempting to repel mass attacks of unfair competition by bringing isolated injunction suits against a host of offenders.

POINT III

The Circuit Court's misinterpretation of the doctrine of *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, which fully justifies the defendants' action here, aside from resulting in a denial of a fair trial, has or will produce a conflict and confusion, having grave public consequences, as to the status of this Court's decisions, with respect to the rights of industry to cooperate for its own protection against unethical or illegal competition and unlawful trade practices.

Within the express sanction of the *Appalachian* case and kindred decisions of this Court these defendants legitimately "were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight" (p. 372).

Within the express sanction of the *Appalachian* case and kindred decisions of this Court these defendants' protective measures were legitimately undertaken for the purpose of "putting an end to injurious practices and the

consequent improvement of the competitive position of a group of producers" (p. 374).

Within the express sanction of the *Appalachian* case, it was "necessary in this instance to consider the economic conditions peculiar to the * * * industry, the practices which have obtained, the nature of defendant's plan * * *, the reasons which led to its adoption" (p. 361).

The rejection, therefore, of these defendants' offers of proof and motion to adduce additional evidence along the lines approved by this Court's decision in that and other kindred cases, resulted, we respectfully submit, in a denial to them of a fair trial.

In *Sugar Institute* v. *United States*, 297 U. S. 553, this Court both recognized and applied the doctrine of the *Appalachian* case, saying (p. 598):

> "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade."

POINT IV

Moreover, the Circuit Court's decision is also in conflict with the decision of this Court in *Maple Flooring Ass'n* v. *U. S.*, 268 U. S. 563.

The basic position of the Circuit Court in sustaining the Commission's order as to the mill selling policy service is "that a combination existed not to buy of manufacturers who dealt with retailers on the same terms on which they dealt with wholesalers." In other words, that a combination to boycott existed.

But in the case at bar there is no evidence that even in a single instance any manufacturer lost the business of a member of the Institute, or of any improper use being made by petitioners of the information in the mill selling policy service so as to cause any change in any manufacturer's general sales policy.

Speaking of what will make illegal a program that is informational in form, this Court stated in *Maple Flooring Ass'n* v. *U. S.* 268 U. S. 563, 583:

> "Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell."

In no previous case has a combination not to buy, in effect a combination to boycott, been held to exist by this Court, without proof of overt acts of not buying or overt acts of boycott, by members of the alleged combination.

Furthermore, in *Cement Manufacturers Ass'n* v. *U. S.*, 268 U. S. 588, this Court said (pp. 603-6):

> "* * * in our view, the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon com-

> merce, even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound. * * *
>
> "It (the record) fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."

In the case at bar the Commission has not found, nor has the Court below pointed out, any evidence of dealings with manufacturers by members of the Institute on the basis of the mill selling policy reports different from the kind of buying which "would naturally flow from a dissemination of that information." There is no evidence of such different kind of action in the record.

The Court below, in striking down the mill selling policy service on the sole basis that a combination existed among the members of the Institute not to buy and without proof of any different kind of buying than would naturally flow from the information itself, has (we respectfully submit) decided this basic point, in conflict with the decisions of this Court in the above cases.

Is it plausible, in the case of a program which has been in operation over ten years that an accompanying combination not to buy, if it existed, would fail to produce a single instance of action, concerted or otherwise, on the part of members in withdrawing patronage from manufacturers who pursued the type of general sales policy against which the alleged combination was directed?

Furthermore, the proof in this case does not present any instance where any manufacturer changed his general sales policy as a result of petitioner's activities. It is confined, so far as any showing of any effect attributable to defendants' program, to a limited group of individual instances where manufacturers stopped selling on a wholesale basis to concerns which were discovered not in fact to be wholesalers.

Petitioner's defenses as to these comparatively few individual instances where manufacturers refused to sell on a wholesale basis to concerns which were not in fact wholesalers are: (1) That such refusals were the voluntary decisions of such manufacturers in the light of the information received, (2) that these masquerading concerns were engaged in dishonest, illegal and discriminatory conduct; and (3) that these defendants had the right for purposes of self-defense to gather and disseminate the information.

Dated, December 29, 1943.

Respectfully submitted,

CHARLES H. TUTTLE,
KARL MICHELET,
STODDARD B. COLBY,
Counsel for Petitioners.

[APPENDIX FOLLOWS]

APPENDIX

Opinion of Circuit Court of Appeals

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 3—October Term, 1943.

(Argued November 4, 1943—Decided November 15, 1943.)

THE WHOLESALE DRY GOODS INSTITUTE INC., *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On petition to review an order of the Federal Trade Commission, directing the petitioners to "cease and desist" from certain practices violative of the Anti-trust Acts.

Before: L. HAND, CLARK and FRANK, *Circuit Judges.*

CHARLES H. TUTTLE, for the petitioners.
EVERETTE MACINTYRE, for the respondent.

Per Curiam:

The Supreme Court held in *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, that retailers who combined not to buy of such jobbers as sold direct to the consumer, were within the Sherman Act, and that

it was no excuse "that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities" (p. 613). There as here the combination was covert, disguised as an interchange of information, whose purpose was innocent; a circumstance which the court naturally, and indeed inevitably, treated as irrelevant, if the agreement peered through the mask. Nothing which has followed has qualified that ruling; it remains true, now as it was then, that such a combination is unlawful no matter how pressing may be the evils which it is designed to correct, and which indeed it may in fact correct; as in the case of the combination to fix prices, nothing will justify it. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. Of the wisdom of so depriving an industry of such means of self-help we have nothing to say; indeed, we have no acquaintance with the subject-matter which would warrant any opinion; once we have ascertained whether in the case at bar there was evidence of such agreement, our function ends.

The petitioner, as we understand it, challenges the continued authority of *Eastern States Lumber Association* v. *United States, supra* (234 U. S. 600), thinking it overruled, or at any rate modified, by *Maple Flooring Association* v. *United States*, 268 U. S. 563; *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588; and *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344. In the first of these cases—it is not necessary to deal separately with the second—an association collected, and passed about, trade information as to prices, supply and production among the members, which, as the court recognized (p. 585), might have been used to fix prices or otherwise to restrict competition, and which a minority of the court thought had been in fact collected for those purposes. However, upon a review of all the evidence the majority found that there was no such understanding

between the members; and the decision really comes to no more than that a trade association may lawfully exchange general trade information, if in fact that is not a fetch or cover for a combination to control the market. Nothing said in either opinion indicates a disposition to overrule *Eastern States Lumber Association* v. *United States, supra* (234 U. S. 600). *In Appalachian Coals Inc.* v. *United States, supra* (288 U. S. 344), there were indeed expressions (p. 374) seeming to indicate that the correction of evils existing in an industry might justify an agreement fixing prices; yet when the whole opinion is read, it appears that the court relied rather upon the fact that the combination controlled too little of the supply really to affect the price of coal (p. 373); and—what was perhaps the same thing in another form—that, in spite of the very substantial percentage of the "Appalachian territory" occupied by the parties, the market to which they had to resort was far wider (p. 376); so wide that their combination could not prejudice the public. Moreover, "whatever may be thought of the implications to be drawn from that decision, the court very positively held in *United States* v. *Socony-Vacuum Oil Co., supra* (310 U. S. 150), that price fixing agreements of every kind are forbidden, and admit of no excuse." So far, therefore, as an agreement of the kind here at bar may be thought to be parallel to a price-fixing agreement—the only assumption on which *Appalachian Coals Inc.* v. *United States, supra* (288 U. S. 344), can be relevant at all—the present state of the decisions gives no countenance to the notion that the doctrine of *Eastern States Lumber Association* v. *United States, supra* (234 U. S. 600), has been relaxed. If the Commission had before it evidence enough to support its finding that a combination existed not to buy of manufacturers who dealt with retailers on the same terms on which they dealt with wholesalers, its order was unquestionably right.

Appendix

The report of the "Differential Committee" of 1930, standing alone, really lends itself to no other conclusion; the scarcely veiled purpose of the whole scheme was patently to prevent manufacturers from dealing directly with retailers. The information exchanged could have had no other use to wholesalers, unlike information as to current, or past, prices, supply and production. There was no action which they could take upon it except to blacklist a manufacturer who would not adhere to the project. Indeed, the only intimation of excuse we can find is that they might learn whom they could "profitably" deal with. If that meant those who by their loyalty would prove in the end profitable to the wholesale trade, it confesses the charge; if it meant that disloyal manufacturers would in general be untrustworthy persons to deal with, it is irrelevant. The restriction being itself unlawful, disregard of it could not lawfully be made on occasion for imposing it upon the pretense that truants were in general morally unfit. That would be to secure compliance indirectly with that which could not be directly enforced. We must not be fobbed off with pious protestations, when the design is so clear. And if it had not been, the later conduct of the association would have left no room for debate. The instructions to buyers, the vote at the general meeting, the Dykstra episode—to take one instance—: each of these alone leave no doubt as to the real understanding. Not only was there "substantial evidence" to support the findings, but it is impossible to see how any fair tribunal could have come to another conclusion.

Order affirmed.

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No. 567

In the Supreme Court of the United States

October Term, 1948

THE WHOLESALE TIRE SUPPLY INSTITUTE, INC., ET AL., PETITIONERS,

v.

FEDERAL TRADE COMMISSION,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 567

THE WHOLESALE DRY GOODS INSTITUTE, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1887) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered December 2, 1943 (R. 1891). Petition for writ of certiorari was filed December 30, 1943. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 719, 15 U. S. C. sec. 45, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Federal Trade Commission, in a proceeding charging unfair methods of competition, is required to admit evidence offered to show the trade conditions which led the parties to enter into a combination to set up a list of wholesalers and to rate manufacturers on the basis of the extent to which they favor the wholesalers so listed, enforced by threat of withdrawal of patronage from manufacturers not conforming to the policy of favoring those on the selected list.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. sec. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The petitioner, The Wholesale Dry Goods Institute, Inc. (referred to herein as the Institute), is an unincorporated association composed of

concerns engaged in selling at wholesale dry goods, notions, and like merchandise, and the other petitioners are members of this association. In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission, after a lengthy hearing, made the following findings of fact, which are not claimed in the petition to be unsupported by the evidence:

From 80 to 85% of the total volume of wholesale trade carried on by general dry goods wholesalers is done by Institute members (R. 287). In 1930 the Institute embarked upon a program of compiling information as to the sales policies of dry goods manufacturers, assigning ratings to these manufacturers based upon their sales policies, informing each manufacturer of his rating and distributing the ratings to its members (R. 294, 297–299). Information on which the ratings were based was obtained to some extent from members, but primarily by sending a questionnaire to manufacturers (R. 294–296). The ratings assigned were designated by symbols: A, A—, B, C, D, K, X, and No (R. 297–298). "A" meant that the manufacturer sold exclusively to those whom the Institute recognized as "wholesalers"; "A—" that it sold regularly only to such wholesalers, but manufactured special contract goods, under buyer's specifications and labels, for national chains and mail order houses; "C" that it sold to others than those recognized by the

Institute as wholesalers but allowed a "reasonable differential" to wholesalers (R. 297–298).[1]

The Institute supplemented its program by adopting a detailed definition of "wholesaler" and publishing a directory listing the concerns (whether Institute members or not) which it deemed came within this definition (R. 299–300). This directory the Institute distributed to its members and to the manufacturers rated by it (R. 299). Many competitors of Institute members engaged in whole or in part in selling dry goods at wholesale and listed as wholesalers by commercial agencies were denied membership in the Institute or listing in its directory upon the ground that their operations did not conform to the Institute definition (R. 302, 304).

The Institute urged its members to report to it any instance of a sale by a manufacturer not consistent with his Institute rating, and thereupon addressed a letter of inquiry to the manufacturer (R. 306, 312–313). If assurance was given that the manufacturer would discontinue the sales complained of, he was notified that no change would be made in his rating, but if no satisfactory adjustment was reached, the Institute gave the manufacturer a lower rating and advised its members of the change (R. 313). The Institute urged

[1] As a further indication of the character of the ratings, "X" meant that a manufacturer, after announcing one policy, had been found to practice another, and "No" meant that information concerning selling policy had been refused (R. 298).

its members to buy only from those classified as having sales policies satisfactory to the Institute and to do everything possible to make manufacturers "rating conscious," and most of the members confined their purchases, so far as practicable, to such manufacturers (R. 305–306, 309).

The Institute's program had a coercive effect upon manufacturers both in selecting their individual customers and in determining their general sales policies (R. 313–314).[2] The tendency and effect of petitioners' combination has been and is to coerce and restrain dry goods manufacturers in their selection of customers; to prevent dealers in dry goods from purchasing their supplies directly from manufacturers; to prevent such dealers from buying at prices as favorable as those granted to Institute members; and to empower petitioners to harass and restrain the operations of those who do not conform to the policies of the Institute (R. 326).

The Commission concluded that petitioners' combination and their practices thereunder were unfair methods of competition forbidden by the Federal Trade Commission Act (R. 326–327).

The Commission issued an order requiring petitioners to cease and desist from combining and conspiring to establish themselves as a preferred class of buyers, or to restrain manufacturers in the determination of their sales and pricing

[2] For various specific instances of such coercive effect, see R. 314–325.

policies or selection of customers, by maintaining and circulating any list of recognized wholesalers or any list of manufacturers so rated as to indicate the degree to which their sales policies are satisfactory to petitioners, or by threatening manufacturers with loss of patronage if they deal with buyers not recognized by petitioners as wholesalers (R. 329–330).

On petition for review of this order, the court below rendered a *per curiam* opinion holding that the Commission's finding of a boycott of manufacturers whose sales policies were disapproved by petitioners was supported by substantial evidence and that such conduct was unlawful (R. 1887–1889). The court said that "it is impossible to see how any fair tribunal could have come to another conclusion" (R. 1889).

ARGUMENT

Petitioners contend (Br. pp. 9–10, 13) that the Commission erred in rejecting evidence offered to show the existence of "abuses" in the industry which their program to rate manufacturers and to list wholesalers might serve to remedy.[3] We

[3] Notwithstanding petitioners' broad characterization of the evidence rejected as relating to "fraudulent, immoral, unethical, discriminatory or illegal" practices (Pet., p. 7), the gist of their only offers of proof as to conditions generally prevailing in the industry was that sales to retailers at the same price as to wholesalers resulted in "inequities" in the distributing trade (R. 1729–1732, 1833–1834). The other rejected proof related to whether particular concerns were doing a wholesale business (R. 188–205).

submit that the irrelevance of such evidence is established by *Eastern States Retail Lumber Dealers' Ass'n* v. *United States,* 234 U. S. 600, and *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457.

In the former case, certain associations of retailers circulated among their members the names of wholesalers who sold direct to consumers with the intent and purpose that members decline to deal with the listed concerns. There was no agreement not to deal with these concerns and no penalty attached for failure so to do (234 U. S. 600, 608). Just as the present petitioners, so the defendants in the *Retail Lumber Dealers* case asserted that their united action constituted a reasonable measure of self-defense against competition and trade which by-passed one step in the distributive process and threatened to destroy a class of distributors alleged to be performing a necessary economic function.[4] But this Court, in holding that a combination to exercise group pressure through the threat of withdrawal of patronage violated the Sherman Act, said (p. 613)

[4] See the statement of the district court, *United States* v. *Eastern States Retail Lumber Dealers' Ass'n,* 201 Fed. 581, 584 (S. D. N. Y.):

"* * * It is pointed out that it is expensive for a retailer to maintain a yard, with large quantities of a great variety of lumber in it, ready for prompt delivery at all times. If his business shrinks, through his losing the chance of making car and schooner load sales in his locality, the local yard, it is said, will become less and less well stocked, and will finally disappear entirely."

that it could not be justified upon the ground that "the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities."

The *Fashion Originators' Guild* case reaffirmed and amplified this holding. In that case the Guild members, manufacturers of garments embodying designs originated by them, agreed not to deal with stores which sold garments copied from the designs of Guild members. This Court upheld the action of the Federal Trade Commission, in a proceeding charging use of unfair methods of competition, in rejecting evidence offered to show that the practices of the Guild were (312 U. S., at 467) "reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four." This Court said (p. 468) that since the combination was such as to fall within the prohibitions of the Sherman Act, evidence offered as to the reasonableness of its practices "is no more material than would be the reasonableness of the prices fixed by unlawful combination."

The characteristics of the combination which this Court referred to in that case (p. 465) as bringing it within the ban of the Sherman Act are also present here. Petitioners' combination narrows the outlets to which dry goods manufacturers can sell and the sources from which dealers in such goods (other than those classified by

petitioners as wholesalers) can buy. The combination subjects all manufacturers who fail to adopt the sales policies advocated by petitioners to an organized boycott. The necessary tendency, as well as the purpose and effect, of the combination is the suppression of competition in the sale of goods direct from manufacturer to retailer. Petitioners determine for themselves who shall be listed as wholesalers and what rating shall be assigned to each manufacturer, and the combination therefore "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce" (p. 465).

Petitioners contend (br. pp. 19–20) that the court below misinterpreted *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. But in that case this Court found that the defendants had not combined to fix or control market price. The view expressed that all concert of action by competitors taken for the purpose of remedying trade abuses is not outlawed by the Sherman Act has application only to a combination which does not regulate prices or production or otherwise suppress competition by illicit means. The boundaries of the decision are clearly marked in later cases.[5]

We likewise submit that petitioners fail to show any conflict between the decision below and *Maple*

[5] *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553, 598–599; *Socony-Vacuum Oil Co.* v. *United States,* 310 U. S. 150, 214–216; *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457, 468.

Flooring Manufacturers Assn. v. *United States,* 268 U. S. 563. That case upheld the activities of a trade association in gathering from its members statistical data on current operations and distributing this information among the members. The basis of decision (pp. 585–586) was that the defendants had not reached or attempted to reach any agreement with respect to limiting production, raising price or otherwise restraining competition. In the instant case the information furnished, as the court below pointed out (R. 1889), has no value to petitioners except as it is made the basis for withholding trade from those whose sales policies are objectionable to petitioners.

Whether petitioners might, without offending the antitrust laws, compile and distribute factual statements showing or tending to show that particular concerns were falsely masquerading as wholesalers is not in issue in this case. Their actual course of conduct was very different. They assumed to judge who should be listed as wholesalers, to assign a specific rating to each manufacturer, and then to enforce these determinations by a thinly veiled threat of withdrawal of patronage. Concerning practices of this character the court said in *Federal Trade Commission* v. *Wallace,* 75 F. (2d) 733, 737 (C. C. A. 8):

> It is not a prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to

enforce by drastic and restrictive measures their conceptions thus formed.

Petitioners urge (br. p. 10) that it was error for the Commission to reject evidence offered to show the percentage of petitioners' sales to the total volume of sales of dry goods to retailers (including sales direct from manufacturer). We submit that this evidence was properly rejected as irrelevant and that in any case, if there was error, it was not prejudicial since the Commission made no finding that petitioners are monopolizing or attempting to monopolize trade in dry goods. Furthermore, a purely evidentiary ruling presents no general question of law warranting review by certiorari.

CONCLUSION

The decision below is clearly correct and is not in conflict with any decision of this Court or of another Circuit Court of Appeals. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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JANUARY 1944.

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